2009

RICCI Glitch? The Unexpected Appearance of Transferred Intent in Title VII

Kerri Lynn Stone
Florida International University College of Law, stonek@fiu.edu

RICCI GLITCH? THE UNEXPECTED APPEARANCE OF TRANSFERRED INTENT IN TITLE VII

Kerri Lynn Stone[*]

I. INTRODUCTION 751
II. TITLE VII, DISPARATE TREATMENT, AND DISPARATE IMPACT 754
III. *RICCI* FACTS 757
IV. *RICCI* ANALYSIS 761
V. OPENING THE DOOR TO A TRANSFERRED INTENT THEORY UNDER TITLE VII? 765
A. TRANSFERRED INTENT 769
B. TITLE VII AND STANDING 772
C. DOES A PLAINTIFF HAVE STANDING TO SUE UNDER TITLE VII AFTER WITNESSING DISCRIMINATION AGAINST SOMEONE ELSE? 780
D. STANDING TO SUE UNDER TITLE VII WHEN DISCRIMINATION AGAINST ANOTHER GROUP RESULTS IN HARM TO PLAINTIFF 783
VI. CONCLUSION 789

I. INTRODUCTION

As of today, no federal or state case and no piece of published scholarship in this country has mentioned the words "Title VII" and "transferred intent" in the same sentence. Their near mutually exclusive relationship in the legal sphere is understandable because the principle of

* Assistant Professor, Florida International University College of Law. J.D., New York University School of Law; B.A., Columbia College, Columbia University. I would like to thank Dean R. Alexander Acosta and Professors Anne Lofaso, Matthew Mirow, Joelle Moreno, Charles Sullivan, Howard Wasserman, Carlton Waterhouse, and Michael Zimmer for all of their support and input in this endeavor. I would also like to thank my research assistant, David Mark, for all of his excellent and able assistance.

transferred intent,[1] which has its genesis in tort and criminal law, has never been seen as factoring into Title VII workplace discrimination jurisprudence. Title VII of the Civil Rights Act of 1964 prohibits discrimination "because of . . . [an] individual's" protected class status, meaning his or her race, color, sex, national origin, or religion.[2] The statute's plain language seems to require that the cause of one's discrimination be one's own protected class status. But what about an employment decision informed only by concern for who is not going to be benefited amidst a group and the protected classes that may be excluded from advancement?

In the recent case of *Ricci v. DeStefano*,[3] the Supreme Court might have officially opened the door to what may be called "transferred intent" jurisprudence under Title VII. The Court did so by assuming that the city of New Haven's refusal to certify the results of a promotion examination that appeared to disproportionately screen out members of minority groups, like African Americans and Hispanics, amounted, presumptively, to deliberate disparate treatment discrimination against all plaintiffs that sought to have the results certified.[4] The Court made this supposition irrespective of the plaintiffs' individual races or whether their individual races were taken into account.[5] However, not all of the plaintiff class was Caucasian; one was a Hispanic firefighter.[6] Consequently, the Court permitted a plaintiff to recover under Title VII whose race, according to the Court, was not considered in and did not motivate the adverse employment decision at all.[7]

Furthermore, it is not entirely clear that the Caucasian plaintiffs' race was the basis of the decision. It is possible that the City decision makers did not take their race into account at all, except insofar as the decision makers noted that there were not enough members of minority groups among them.

By taking this approach in *Ricci*, the Supreme Court appears to have resolved a split among lower courts that spanned decades as to the proper reach of Title VII, albeit tacitly, and seemingly unwittingly. The

---

1. Transferred intent is "[t]he rule that if one person intends to harm a second person but instead unintentionally harms a third, the first person's criminal or tortious intent toward the second applies to the third as well." BLACK'S LAW DICTIONARY 1536 (8th ed. 2004).

2. 42 U.S.C. § 2000e-2(a)(1) (2006).

3. Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

4. *See* discussion *infra* Part III.

5. *See* discussion *infra* Part III.

6. *See* discussion *infra* Part III.

7. *See* discussion *infra* Part III.

ramifications of this decision are likely to be far-reaching, and may even have been unintended by the Court, which held that the city of New Haven, Connecticut violated Title VII when it refused to certify the results of a promotional exam given to firefighters.[8] The refusal to certify occurred after the City learned that Caucasian test takers had outperformed minority test takers to such an extent that it feared a disparate impact lawsuit brought by the minority firefighters if it did not discard the test results.[9]

Under a "transferred intent" theory of Title VII, one who is adversely affected by a decision that is "race-conscious," or made with race in mind, may prove intentional disparate treatment under Title VII, even if *her race* was not considered at all or was consciously disregarded in the decision making process. While this result appears to contravene the language of the statute which focuses on the protected status of the plaintiff, it may be compelled or at least authorized by *Ricci's* holding and language. To the extent that lower courts have looked at cases like *Ricci*—in which plaintiffs are adversely affected by discrimination but are not discriminated against because of their protected class status—and come to different and disparate conclusions, *Ricci* might well have resolved the split without recognizing that it had done so or other implications of the decision.

The issue of whether or not so-called "transferred intent" is discernible in this case is somewhat unclear. The Supreme Court's holding was ultimately that the city's sentiment that "'too many whites and not enough minorities would be promoted were the lists to be certified[,]' [w]ithout some other justification . . . violates Title VII's command that employers cannot take adverse employment actions because of an individual's race."[10] As long as the city considered this Hispanic firefighter to be a member of a minority group, it would have had to take the action it took with respect to this plaintiff in spite of his race, rather than because of it.

In evaluating the *Ricci* holding and developing the theory of transferred intent within Title VII, this Article first discusses Title VII discrimination and disparate impact law generally in Part II. Next, it delineates the facts and analysis of *Ricci* in Parts III and IV. Part V illustrates the ways in which *Ricci* supports a transferred intent theory under Title VII and discusses how *Ricci* may have inadvertently resolved a circuit split. Finally, Part VI ends the Article with a recapitulation of *Ricci's* implications.

---

8. Ricci v. DeStefano, 129 S. Ct. 2658, 2681 (2009).

9. *Id.* at 2664.

10. *Id.* at 2673 (quoting Ricci v. DeStefano, 554 F. Supp. 2d 142, 152 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008) (per curiam), *rev'd*, 129 S. Ct. 2658 (2009)).

II. TITLE VII, DISPARATE TREATMENT, AND DISPARATE IMPACT

It is illegal for an employer to intentionally treat an employee in a discriminatory manner because of the employee's protected class status. Similarly, it is illegal for an employer to engage in an employment practice that confers a disproportionate harm or disadvantage to members of a protected class unless that practice is a business necessity and capable of being accomplished through no less restrictive means. The Supreme Court construed *Ricci* as an invitation to answer the question of how courts should negotiate a situation in which an employer has purportedly engaged in the deliberate disparate treatment of employees in order to stave off liability for a practice which could confer an illegal disparate impact on a protected class. A brief discussion of the causes of action and frameworks implicated is thus in order.

Title VII of the Civil Rights Act of 1964 prohibits employers from "fail[ing] or refus[ing] to hire or . . . discharg[ing] any individual, or otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[11] Originally, the legislation spoke only to intentional disparate treatment of employees because of their protected status. The law, however, evolved in the decades following its passage when the Court recognized that an employer could discriminate against its employees, either intentionally or unintentionally, by imposing upon them a facially neutral policy or practice that had a disparate impact on members of a protected class.[12]

A disparate treatment cause of action arises when an employer "treat[s a] particular person less favorably than others because of" his or her protected class status.[13] To succeed in a claim of disparate treatment, a plaintiff must show the defendant's "discriminatory intent or motive" for taking a job-related action.[14] However, following the landmark Supreme Court case *Griggs v. Duke Power Co.*,[15] a plaintiff may also make out a cause of action where he or she has lost an employment opportunity as the result of an employer policy or practice that has a disparate impact upon the protected class to which he or she belongs.[16] This cause of action will arise

11. 42 U.S.C. § 2000e-2(a)(1) (2006).

12. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

13. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 985-86 (1988).

14. *Id.* at 986.

15. *Griggs*, 401 U.S. 424.

16. *Id.* at 436 (Through its passing of the Civil Rights Act of 1964, Congress has commanded that any employee testing procedure used "must measure the person for the job and not the person

even when the employer did not intend to discriminate.[17]

In *Griggs*, African American workers were being disproportionately screened out of employment opportunities vis-à-vis their Caucasian counterparts. Their employer required that applicants and employees who sought to transfer jobs have a high school diploma and pass a "standardized general intelligence test" which the Court found had no "demonstrable relationship to successful performance of the jobs for which it was used."[18] The Court pointed out that "the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites."[19]

Emphasizing that Congress's clear intent in enacting Title VII was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees," the *Griggs* Court observed that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[20] The Court thus held that Title VII proscribes certain employment practices, including those effectuated without discriminatory intent. This unintentional discrimination occurs where employment practices function as "artificial, arbitrary, and unnecessary barriers" that "operate invidiously to discriminate on the basis of [an] impermissible classification."[21] In other words, "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."[22] Moreover, to the extent that an employer felt that a challenged practice was relevant to job success, the Court noted that as per Congress's mandate, the employer must show the requirement's "manifest relationship to the employment . . . ."[23]

In 1988, seventeen years after *Griggs*, the Court continued to shape the disparate impact cause of action in *Watson v. Fort Worth Bank & Trust*.[24] In *Watson*, the Court noted that the more "obvious" examples of

---

in the abstract.").

17. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

18. *Id.* at 425-26, 431.

19. *Id.* at 426.

20. *Id.* at 429-30.

21. *Id.* at 431.

22. *Id.* at 432.

23. *Griggs*, 401 U.S. at 432. The Supreme Court departed from *Griggs*'s construction of the disparate impact claim in *Ward's Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989). Congress swiftly responded to *Ward's Cove* by enacting the Civil Rights Act of 1991, which re-instituted the business necessity defense as set forth in *Griggs*.

24. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

disparate impact that courts had evaluated occurred "where facially neutral job requirements necessarily operated to perpetuate the effects of intentional discrimination that occurred before Title VII was enacted."[25] However, cognizable claims also exist where "some facially neutral employment practices . . . violate[d] Title VII even in the absence of a demonstrated discriminatory intent."[26] The Court refused to confine valid claims to those "in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination," and noted that each of the disparate impact cases it had previously decided involved "standardized employment tests or criteria."[27]

In *Watson*, however, the Court held for the first time that a disparate impact analysis was applicable in instances where employment decisions were premised upon "subjective" criteria, such as interviews and other forms of non-standardized evaluation.[28] The Court noted that, notwithstanding the fact that subjective decision-makers can always act with express, invidious prejudice, they can also—in some cases—still be guided by, among other things, "subconscious stereotypes and prejudices" despite not harboring a conscious, demonstrable discriminatory intent.[29] Thus, according to the Court, "[i]f an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply."[30]

Three years after *Watson*, Congress enacted the Civil Rights Act of 1991, codifying the disparate impact cause of action and setting forth the premise that a plaintiff may establish a prima facie case of disparate impact discrimination where she shows, typically through statistical means, that her employer has used "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."[31] The

25. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988).

26. *Id.* at 988.

27. *Id.* (citing Connecticut v. Teal, 457 U.S. 440 (1982) (written examination); N.Y City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (rule against employing drug addicts); Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight requirements); Washington v. Davis, 426 U.S. 229 (1976) (written test of verbal skills); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (written aptitude tests)).

28. *Watson*, 487 U.S. at 990.

29. *Id.*

30. *Id.* at 990-91.

31. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006). The Supreme Court, in a departure from the disparate impact framework crafted in *Griggs*, endeavored to expand the business necessity defense afforded in the disparate impact analysis in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989). Congress passed the 1991 Act to abrogate the *Wards Cove* definition of business

employer is then able to avoid liability if it can demonstrate that the challenged practice is "job related for the position in question and consistent with business necessity."[32] Nevertheless, the plaintiff will still prevail if he or she can show that other tests or selection protocols could serve the employer's interest absent the discriminatory effect in practice.[33]

Not only were both the disparate impact and disparate treatment causes of action significant in *Ricci*; their complex interplay was also at issue. Essentially, the Court confronted a scenario in which a potential defendant acted to avoid disparate impact liability to African Americans and found itself in court defending against a disparate treatment claim by Caucasians. The Supreme Court was ultimately called upon to craft a standard for permissible, legal attempts to avert disparate impact liability by engaging in disparate class-based treatment, and to hold the city of New Haven up against that standard to see whether it had been met.

III. *RICCI* FACTS

The plaintiffs in the case, Caucasian and Hispanic firefighters, sued the city of New Haven (City) and certain named city officials, alleging that they had been the victims of disparate treatment on the basis of race in contravention of Title VII and the Equal Protection Clause of the Fourteenth Amendment.[34] The defendants protested that had the City certified the results of the examination, it would have been potentially liable for a Title VII violation against minority firefighters under a theory of disparate impact.[35]

In 2003, one hundred eighteen New Haven firefighters sat for an exam to qualify them for promotions within the department.[36] As the Supreme Court recognized, "the stakes were high," because the City did not administer promotion examinations often, and both the identities and order of candidates for promotion over the subsequent two years would be

---

necessity and to codify the pre-*Wards Cove* jurisprudence by clarifying that "[t]he terms 'business necessity' and 'job related' [as used in the Act] are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.* . . . and in the other Supreme Court decisions prior to *Wards Cove Packing Co., Inc. v. Antonio* . . . ." 137 CONG. REC. S15273 (daily ed. Oct. 25, 1991) (statement of Sen. Danforth); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

32. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

33. *Id.* § 2000e-2(k)(1)(A)(ii); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).

34. Ricci v. DeStefano, 129 S. Ct. 2658, 2671 (2009).

35. *Id.* Thus, the defendants believed that because they were attempting to comply with Title VII's protection against disparate impact, they could not be held liable under a Title VII disparate treatment claim.

36. *Id.* at 2664.

determined by the results of the exam.[37] Those who sat for the exam often invested much in the way of time, money, and other resources into preparation.[38] Pursuant to the City's contract with the New Haven firefighters' union, "applicants for lieutenant and captain positions were to be screened using written and oral examinations, with the written exam accounting for 60 percent and the oral exam 40 percent of an applicant's total score."[39] The City spent $100,000 to retain Industrial/Organizational Solutions, Inc. (IOS) to design and give a written examination that would assess test-takers' job-related knowledge, as well as oral examinations.[40] IOS developed the written and oral tests "based on the job-analysis results, to test most heavily those qualities that the results indicated were 'critica[l] or essential[l],'" while drawing "material for each test question directly from the approved source materials," and employing "third-party reviewers [who] had scrutinized the examinations to ensure that the written test was drawn from the source material and that the oral test accurately tested real-world situations that captains and lieutenants would face."[41] The City made sure that the oral-examination panelists who had been chosen by IOS formed three-member assessment panels such that each panel included one Caucasian, one African American, and one Hispanic panelist.[42] The exam was given after a three-month "study period," during which candidates for the exam could consult with specified source materials.[43]

The results of the test showed that of the 77 candidates who took the lieutenant examination (43 Caucasians, 19 African Americans, and 15 Hispanics), 34 candidates passed, of whom 25 were Caucasian, 6 were African American, and 3 were Hispanic.[44] Based upon the City's governing promotion structure and the number of extant vacancies, the top ten exam candidates, all of whom were Caucasian, were eligible for immediate promotion to the position of lieutenant.[45] As for the captain's examination, 41 people sat for the exam—25 of whom were Caucasian, 8 of whom were African American, and 8 of whom were Hispanic.[46] Of the 41 people who sat for the captain's exam, only 22 passed—16 of whom were Caucasian, 3

37. Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009).

38. *Id.* at 2676.

39. *Id.* at 2665.

40. *Id.*

41. *Id.* at 2668.

42. *Id.*

43. *Ricci*, 129 S. Ct. at 2666. The source material list that the City gave to each candidate "includ[ed] the specific chapters from which the questions were taken." *Id.*

44. *Id.*

45. *Id.* As the Court noted, "[s]ubsequent vacancies would have allowed at least 3 black candidates to be considered for promotion to lieutenant." *Id.*

46. *Id.*

of whom were African American, and 3 of whom were Hispanic.[47] Pursuant to the City's governing promotion structure, 9 candidates were in line for an immediate promotion to the position of captain, 7 of whom were Caucasian and 2 of whom were Hispanic.[48]

In the wake of the release of the examination results, New Haven officials voiced their concern that the exams had operated to discriminate against the minority candidates who sat for it;[49] others countered that there were explanations for the disparity in the results and that nothing about the tests or the City's actions were violative of anyone's rights or any statute.[50] A rancorous debate ensued among the officials, the firefighters, themselves, and the public over the proposed certification of the results, with City officials arguing now that the City might be liable for a disparate impact created by the examinations, in contravention of Title VII.[51] As the Court recited, while some criticized the exam questions as, among other things, antiquated or irrelevant to the needs of firefighting in New Haven, Frank Ricci, a Caucasian firefighter who became the named plaintiff in this case, spoke out in favor of certifying the exam results, stating that the questions on the exams "were based on the Department's own rules and procedures and on 'nationally recognized' materials that represented the 'accepted standards' for firefighting."[52] Additionally, Ricci stated "that he had 'several learning disabilities,' including dyslexia; that he had spent more than $1,000 to purchase the materials and pay his neighbor to read them on tape so he could 'give it [his] best shot'; and that he had studied '8 to 13 hours a day to prepare,'" noting that while he didn't "even know if [he] made it," it should nonetheless be the case that "the people who passed

47. Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009).

48. *Id.*

49. *Id.* Some members of the New Haven Civil Service Board and City Council believed that the exam outcome was a blatant demonstration of disparate impact. *Id.*

50. *Id.* The leader of the IOS team that developed and administered the tests felt that the examination was fair, and stated that "any numerical disparity between white and minority candidates was likely due to various external factors and was in line with results of the Department's previous promotional examinations." *Id.* Janet Helms, a Boston College professor, whose expertise is in "race and culture as they influence performance on tests and other assessment procedures" testified that the exam results should not be reconsidered, stating that "'regardless of what kind of written test we give in this country . . . we can just about predict how many people will pass who are members of under-represented groups. And your data are not that inconsistent with what predictions would say were the case.'" *Id.* at 2669. Moreover, Helms stated that regardless of what kind of exam the City had given to the candidates, there would have been "'a disparity between blacks and whites, Hispanics and whites,' particularly on a written test." *Id.*

51. *Id.* at 2666-71.

52. *Id.* at 2667. It bears noting that at the time of his statements in favor of certifying the exam results, Ricci did not know whether he had passed or failed the exam. *Id.*

should be promoted," because "[w]hen your life's on the line, second best may not be good enough."[53]

Members of the community, however, asked the City to discard the examination results, including a representative of the International Association of Black Professional Firefighters, who described them as "inherently unfair."[54] A series of meetings, hearings, and information gathering followed.[55] The City ultimately decided not to certify the results of the examinations,[56] and it, along with several City officials, was sued by eighteen plaintiffs, seventeen of whom were Caucasian and one of whom was Hispanic, alleging violations of the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964.[57] The defendants had been presented with an impossible choice: they were forced to choose between taking an action—certification—that could result in a disparate impact lawsuit brought by the minority firefighters and another action—discarding the results—that could, and did, result in a lawsuit brought by those who had done well enough to be promoted, for disparate treatment in violation of Title VII.[58]

The District Court granted the defendants' motion for summary judgment,[59] and the Court of Appeals for the Second Circuit affirmed in a *per curiam* opinion.[60] The Supreme Court ultimately reversed the Court of

---

53. Ricci v. DeStefano, 129 S. Ct. 2658, 2667 (2009).

54. *Id.*

55. *Id.* at 2667-71. The New Haven Civil Service Board met five times shortly after the exam to discuss whether the results should be certified or discarded. *See id.* Each meeting included experts and witnesses, as well as many of the firefighters from both sides who attended to voice their opinions on the matter. *See id.*

56. The Civil Service Board vote on whether to certify the examination scores resulted in a 2-2 tie (after one member removed himself from the vote), which led to a decision to not do so. *Id.* at 2671.

57. *Id.*

58. *Id.* at 2664.

59. *Ricci*, 129 S. Ct. at 2671-72 (citing Ricci v. DeStefano, 554 F. Supp. 2d 142 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008) (per curiam), *rev'd*, 129 S. Ct. 2658 (2009)). The District Court stated that the respondents' "motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent," and that the City's decision to not certify the results was not "based on race" because "all applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted." *Id.* at 2671 (citing *Ricci*, 554 F. Supp. 2d 142, 160 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008) (per curiam), *rev'd*, 129 S. Ct. 2658 (2009)).

60. *Id.* at 2672 (citing Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008) (per curiam), *rev'd*, 129 S. Ct. 2658 (2009)). The Court of Appeals affirmed using the same rationale as the District Court. *Id. Compare Ricci*, 554 F. Supp. 2d 142 (district court opinion), *with Ricci*, 530 F.3d 87 (Second Circuit Court of Appeals' opinion). Now-Supreme Court Justice Sonia Sotomayor was, at the time, on the panel of judges that heard the case. *See generally* Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008) (per curiam), *rev'd*, 129 S. Ct. 2658 (2009).

Appeals, finding that there had been disparate treatment of the plaintiffs in contravention of Title VII.[61]

The Supreme Court held that the defendants had indeed violated Title VII by intentionally discriminating against the plaintiffs.[62] Specifically, the Court found that "race-based action like the City's in this case is impermissible under Title VII [and] unless the employer can demonstrate a strong basis in evidence that had it not taken the action, it would have been liable under the disparate-impact statute."[63] Moreover, the Court found that the defendants failed to meet the newly-announced strong basis in evidence test, and it elaborated upon the reasons for this conclusion.[64] Notably, the Court determined as a matter of law that the strong basis in evidence test had not been met, based upon the record before it.[65] It did not simply remand the case to a lower court for factual determinations and resolutions, as one might have expected it to when engaging with such a fact-specific query.

IV. *RICCI* ANALYSIS

The Court acknowledged that it would be negotiating the competing interests of abjuring from engaging in intentional disparate treatment against one class of individuals while simultaneously guarding against having a disparate impact on another group. Interestingly, it began its analysis as follows:

> Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense. All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race—i.e., how minority candidates had performed when compared to white candidates. As the District Court put it, the City rejected the test results because "too many whites and not enough minorities would be promoted were the lists to be certified." Without some other justification, this express, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment

61. Ricci v. DeStefano, 129 S. Ct. 2658, 2681 (2009).

62. *Id.* at 2664.

63. *Id.*

64. *Id.* The Court declined to address whether defendants' actions violated the Equal Protection Clause as the issue was rendered moot by its conclusion that the City's actions violated Title VII. *Id.* at 2664, 2676.

65. *Id.* at 2681 (stating that "there [was] no evidence – let alone the required strong basis in evidence – that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City").

actions because of an individual's race.[66]

The Court went on to reject the possibility that the decision not to certify the examination results was immunized from disparate treatment liability by the City's desire to avert disparate impact liability. It noted that notwithstanding the fact that the City's objectives and intentions might have been benign or even good, "the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white."[67] The issue was, then, whether the City could in any way justify its race-based discrimination, and not whether that discrimination existed in the first place.[68]

The Court rejected the City's purported good faith as a defense. It ultimately held that a stricter standard was needed because permitting the City's good faith efforts to avoid disparate impact liability to serve as a defense to disparate treatment liability "would encourage race-based action at the slightest hint of disparate impact."[69] The Court held that "under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."[70]

As the Court explained, the newly-announced strong-basis-in-evidence standard gives effect to both the disparate treatment and the disparate impact provisions that the law had read into the statutory language.[71] The standard gives effect to the disparate treatment and disparate impact provisions by permitting a defendant to engage in disparate treatment to stave off a charge of disparate impact discrimination in limited circumstances only.[72] It also allows for employers' voluntary efforts to comply with the statute, which, as the Court pointed out, are crucial to the attainment of Congress's goals in passing the statute: the elimination of workplace discrimination and the inclusion of those historically excluded from the workplace due to protected class membership.[73] Additionally, the Court noted that the strong-basis-in-

66. Ricci v. DeStefano, 129 S. Ct. 2658, 2673 (2009) (citing 42 U.S.C. § 2000e-2(a)(1) (2006)).

67. *Id.* at 2674.

68. *Id.*

69. *Id.* at 2675.

70. *Id.* at 2677.

71. *Id.* at 2676.

72. *Ricci*, 129 S. Ct. at 2676.

73. *Id.*

evidence standard "appropriately constrains employers' discretion in making race-based decisions" because it "limits that discretion to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation."[74]

Rather than stopping at announcing the new standard, the Court took the most unusual step of determining as a matter of law that the test had not been met—that there was not so much as a triable issue of fact as to whether or not the new test had been met.[75] The Court went on to explain why the City did not meet the strong basis in evidence standard. On one hand, the Court explained, the City was undoubtedly "faced with a prima facie case of disparate-impact liability," by virtue of the stark racial disparity in the test results and the fact that "certifying the examinations would have meant that the City could not have considered black candidates for any of the then-vacant lieutenant or captain positions."[76] Ultimately, however, the Court found that the second and third steps of the disparate impact analysis did not meet the new threshold standard; using the City officials' testimony as to the painstaking steps that it had taken to ensure that the test was job related and fair, the Court found that "[t]here is no genuine dispute that the examinations were job-related and consistent with business necessity. The City's assertions to the contrary are blatantly contradicted by the record."[77]

Moreover, the Court found, the defendants "also lacked a strong basis in evidence of an equally valid, less-discriminatory testing alternative that the City, "by certifying the examination results, would necessarily have refused to adopt."[78] The Court concluded that

> there is no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City. Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions. The City's discarding the test results was impermissible under Title VII, and summary judgment is appropriate for petitioners on their disparate-treatment claim.[79]

---

74. Ricci v. DeStefano, 129 S. Ct. 2658, 2676 (2009).

75. *Id.* at 2677.

76. *Id.* at 2677-78.

77. *Id.*

78. *Id.* at 2679.

79. *Id.* at 2681.

Despite the Court's claim that its holding in the case "clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions,"[80] its guidance was less than crystalline. The Court had now identified the standard as occupying the space somewhere in between a potential disparate impact defendant's being certain that a disparate impact case would succeed (which was deemed more than that which was necessary to justify a race-conscious intentional act) and merely having a prima facie case and less than a substantial basis in evidence to conclude it would ultimately lose the case. This nebulous, almost indiscernible locus of space is certain to be bemoaned by attorneys trying to counsel clients who find themselves facing a dilemma like the city of New Haven. Without the aid of hindsight or a crystal ball, future potential defendants, situated as the city of New Haven was, will likely—whether or not they act to avoid disparate impact liability—find themselves actual defendants in court and less than certain whether they will defend their choices successfully.

Interestingly, on October 15, 2009, a lawsuit was filed by an African American firefighter who alleged that the selection process/testing mechanism utilized by the City was "irrational[]" and "unfair[]."[81] Presumably styled to set forth a disparate impact claim, although adverting to intent in the form of knowledge that the City likely possessed, the Complaint took issue with, among other things, the weighting of the different portions of the test and alleged that "[a]t the time that the City chose to administer the 2003 exam, it had other alternatives readily available that would have better served the goal of public safety and, as the City knew or should have known, would have had much less, if any, exclusionary effect on African-American candidates."[82] The plaintiff, the Complaint alleged, would have ranked very highly if the City had opted to utilize any of these alternatives.[83] The Complaint requested monetary and injunctive relief which would make the plaintiff immediately eligible for the position he alleged he should have had and which would prohibit the City from utilizing a discriminatory selection system to make promotions or from implementing a discriminatory weighting system for any test components without job relatedness or business necessity.[84]

---

80. Ricci v. DeStefano, 129 S. Ct. 2658, 2681 (2009).

81. Complaint for Damages and Injunctive Relief at 6, Briscoe v. New Haven, No. 3:09-cv-01642 (D. Conn. Oct. 15, 2009), *available at* http://www.plansponsor.com/up load files/newnewhavensuit.pdf (enter "Briscoe" in Advanced Search and select *Conn. Town's Fire Dept. Exam Back in the Courts*).

82. *Id.* at 8.

83. *Id.*

84. Complaint for Damages and Injunctive Relief at 7-8, Briscoe v. New Haven, No. 3:09-cv-01642 (D. Conn. Oct. 15, 2009), *available at* http://www.plansponsor.com/up load

The outcome of this case is of interest to many, especially in light of the fact that the Supreme Court found as a matter of law in *Ricci* that there was not a strong basis in evidence to establish that the exams were defective so as to have been able to confer disparate impact liability on the City. The premise of the *Ricci* case was that the plaintiffs had been subject to disparate treatment based on race. As Justice Ginsburg noted in her dissent, the City officials "were no doubt conscious of race during their decisionmaking process, . . . but this did not mean they had engaged in racially disparate treatment."[85] Indeed, it looks very much as though the Court was willing to recast the City's intent to include those conspicuously absent from the promotion list as disparate treatment "because of race" with respect to the plaintiffs.

V. OPENING THE DOOR TO A TRANSFERRED INTENT THEORY UNDER TITLE VII?

There are certain to be numerous critiques of *Ricci* in the coming months and years.[86] Perhaps the most interesting wrinkle in this case, however, stems from its "premise."[87] Despite the Supreme Court's proclamation in *Ricci* that "[d]isparate-treatment cases present the most easily understood type of discrimination,"[88] a close reading of the case and its premise might undermine, if not wholly contravene, this statement. The Court, it must be recalled, began its analysis of the case by starting from the basic premise that discarding the examination results "would violate the disparate-treatment prohibition of Title VII absent some valid defense."[89] This was true, according to the Court, because "the City chose not to certify the examination results because of the statistical disparity based on race."[90] However, Title VII's mandate is that an individual should not be subject to changes in the terms or conditions of employment "because of such

files/newnewhavensuit.pdf (enter "Briscoe" in Advanced Search and select *Conn. Town's Fire Dept. Exam Back in the Courts*).

85. Ricci v. DeStefano, 129 S. Ct. 2658, 2696 (2009) (Ginsberg, J., dissenting).

86. *See, e.g.*, Jess Bravin & Suzanne Sataline, *Ruling Upends Race's Role in Hiring*, WALL ST. J., June 30, 2009, at A1, *available at* http://online.wsj.com/article/SB12462905 0175468575.html (discussing the impact of the *Ricci* decision on companies and how some attorneys believe that "the already uncertain role of race in the workplace would be further unsettled," as "[t]he ruling could cause employers to be overly cautious in their hiring to avoid mishandling tests or interviews for fear of being sued." On the other hand, some attorneys believe that "the ruling could bring welcome relief to employers who wouldn't otherwise know how to handle a similar circumstance.").

87. *See Ricci*, 129 S. Ct. at 2673.

88. *Id.* at 2672 (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)).

89. *Id.* at 2673.

90. *Id.*

individual's" protected class status—here, race.[91] The *Ricci* Court even noted that "the original, foundational prohibition of Title VII bars employers from taking adverse action 'because of . . . race.'"[92]

Were any of the Caucasian plaintiffs actually discriminated against because of their race, pursuant to the traditional disparate treatment model? Despite the fact that this was the Supreme Court's very premise, posited without a doubt, it may very well be argued that the races of those plaintiffs was not taken into account at all by the decisionmakers, except, as mentioned above, insofar as they noted the group's lack of diversity.

Perhaps an even trickier question is whether the lone Hispanic plaintiff, Lieutenant Ben Vargas, who also emerged victorious in this case, was actually subjected to an adverse job action "because of" his race. It can hardly be argued that the decision not to certify the test results or the particular adverse effect felt by Lieutenant Vargas occurred because of his Hispanic identity. If anything, the City's failure to offer Lieutenant Vargas the promotion he sued to procure occurred *despite* and not because of his race.[93] This issue, however, was one that the Court did not appear to deem worthy of so much as discussion before it set forth its premise that all of the plaintiffs had been the victims of disparate treatment based on race at the hand of the City. The Court further stated that the only open question was whether any consideration undertaken by the City as to the potential for a disparate *impact* could somehow justify what it had done.

Moreover, if Lieutenant Vargas was not discriminated against because of his race, should he, a member of a group included in the designated "minority firefighters" to whom the City tried to bring justice, inadvertently harmed, have been excluded from the class? To have done this would have singled out Lieutenant Vargas, who was identically situated to the other plaintiffs, on the basis of his race for less protection under the statute in theory. Granted, he would have benefited nonetheless when the results of the examination were certified.

To have treated Lieutenant Vargas differently than his fellow plaintiffs

---

91. *See* 42 U.S.C. § 2000e-2(a)(1) (2006).

92. Ricci v. DeStefano, 129 S. Ct. 2658, 2696 (2009) (citing 42 U.S.C. § 2000e-2(a)(1)).

93. This question potentially implicates another vitally important question, which is how one goes about defining his own race or ethnicity and self-identifying as a member of one class or another. Whether and how to police one's own self-identification as a member of a protected class like "Hispanic" is perplexing, and some might say an intractable problem that implicates the contours of racial and ethnic identity constructs. There is a rich body of literature on this topic. *See, e.g.*, Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even If Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283 (2005).

and to do so specifically because of his race would not seem to comport with Title VII's broad remedial goal of "strik[ing] at the entire spectrum of disparate treatment of men and women . . . ."[94] To the extent that Lieutenant Vargas *was* properly considered to have been the victim of disparate treatment under Title VII, the Supreme Court, albeit probably unwittingly, officially opened the door to what may be called a theory of "transferred intent" under Title VII. This theory provides that one who was not the intended target of a race-based action or a race-conscious decision has recourse under Title VII for an adverse action that befell the individual *despite* and certainly not "because of" the individual's race. As will be discussed, some lower court cases have seemed to so hold, while other lower court cases that have rejected this precept.

To the extent that the Supreme Court decided the issue once and for all in *Ricci*, it looks to have been far from a knowing, conscious holding. Nonetheless, just as one who aims to strike one person but strikes another is liable for the tort of intentional battery via the principle of transferred intent, so now may an employer whose intent to diversify the workplace generally and to look at the races of those who are *not* benefited or present be liable for intentional, race-based discrimination against those whose races it does not explicitly consider.

It should be noted that Lieutenant Vargas was physically and savagely attacked in 2004. He believes this was in retaliation for his having joined the Caucasian plaintiffs in *Ricci* and claiming race discrimination.[95] Indeed, he revealed in a recent New York Times article that he quit the Hispanic Firefighters' Association after it and its members refused to publicly support him in the lawsuit.[96] Lieutenant Vargas had achieved the sixth highest score on the test, and was, as the New York Times reported, "ridiculed as a token, a turncoat and an Uncle Tom—all of which, he said, 'made my resolve that much stronger.'"[97] He will likely now receive the promotion to captain that he sought when he sat for the exam.[98]

Arguably Lieutenant Vargas, as the lone Hispanic plaintiff, was harmed by the decision not to certify the examination results as one who was not African American, as were the Caucasian plaintiffs. Following this logic, it may be argued that his inclusion in the class of those harmed stems

94. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (quoting L.A. Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

95. A.G. Sulzberger, *Bias Suit A Test of Resolve for Hispanic Man*, N.Y. TIMES, July 3, 2009, at A20, *available at* http://www.nytimes.com/2009/07/03/nyregion/03firefighter.html.

96. *Id.*

97. *Id.*

98. *Id.*

from his racial identity. This assertion, however, is not only weak, but is also wholly belied by the District Court and the Supreme Court's own assertion that the intentional act at issue occurred when "the City rejected the test results because 'too many whites and not enough minorities would be promoted were the lists to be certified.'"[99]

In any event, ponder two even tougher hypotheticals. First, consider an African American plaintiff who had done well enough on the exam to attain promotion and sought to be included among the plaintiffs. In that case, would the Court have denied relief to this plaintiff, identically situated to the other plaintiffs, based on nothing more than his race? Finally, consider a second scenario in which, unlike this case, the defendant has evinced express, discriminatory racial animus.[100] If an employer with an expressed bias against Asian Americans announced that in an attempt to lower the number of Asian Americans in his workforce, he would be firing all employees who had one-syllable last names, and if a non Asian-American got fired because of this, would a cause of action under Title VII be viable? Again, to the extent that this plaintiff could not sue under Title VII, the law would be permitting a race-based/race conscious act that, unlike the one in *Ricci*, was actually motivated by explicit, expressed discriminatory bias, rather than a conciliatory attempt to adversely affect an individual with no recourse. If he could be a plaintiff, however, as he likely could now under *Ricci*, the law has then moved to a point at which the invidious intent shown by the employer toward one group is actually transferred to a member of another class or group adversely affected by the same decision. To the extent that this is now the case, it needs to be recognized, as should the irony of its likely having been unwittingly accomplished by the *Ricci* Court.

The *Ricci* Court looks to have paved the way for the incorporation of transferred intent theory into Title VII law, not only through the substance of its rulings, but through the language it used. The broadness, and even vagueness, of the language employed in statements such as "[w]ithout some other justification, this express, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race,"[101] cannot be denied and lends credence to the transferred intent theory of Title VII. The Court observed that "the City made its employment decision because of race," when it "rejected the test

99. Ricci v. DeStefano, 129 S. Ct. 2658, 2673 (2009) (quoting Ricci v. DeStefano, 554 F. Supp. 2d 142, 152 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008) (per curiam), *rev'd*, 129 S. Ct. 2658 (2009)).

100. Posting of Kerri Stone courtesy of Howard Wasserman to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/2009/07/page/3/ (July 6, 2009, 06:46 CST).

101. *Ricci*, 129 S. Ct. at 2673.

results solely because the higher scoring candidates were white."[102] When the Court concluded that the City's "own arguments . . . show that the City's reasons for advocating non-certification were related to the racial distribution of the results," and found, based on this relationship, that the race-consciousness present in the decision was tantamount to the disparate treatment of all of the plaintiffs who sought to have the examination results certified,[103] it made the determination that discrimination against anyone that is accomplished through the vehicle of a "race-conscious" or "race-based" decision is disparate treatment. Moreover, the Court determined that this amounts to disparate treatment irrespective of whether the intent is to harm any group, let alone the group adversely affected by the decision. This determination is made more remarkable by the fact that the disparate treatment cause of action, as opposed to the disparate impact cause of action, requires a showing of intent to discriminate by the plaintiff.[104]

A. TRANSFERRED INTENT

It is important to give some background as to the law of transferred intent, whereby the law literally permits the transferal of one's intent to affect or consider someone onto someone else who was not the object of the intent, but nonetheless sustained harm due to action spurred by it. The doctrine of transferred intent is well entrenched in American law and has a long history in both tort and criminal law.[105] In criminal law, the doctrine of transferred intent applies when one's intent to harm another individual is literally "transferred" to an unintended victim, rendering the actor liable for an intentional crime despite the fact that he had no intent to harm his victim.[106] Thus,

> [t]he doctrine of transferred intent indicates that where an individual is attempting to harm one person and as a result accidentally harms another, the intent to harm the first person is transferred to the second

---

102. Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009).

103. *Id.* at 2673.

104. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

105. *See* People v. Slater, No. 4-07-0966, 2009 WL 3163518, at *6 (Ill. App. Ct. June 26, 2009).

106. *See* 6 AM. JUR. 2D *Assault and Battery* § 20 (2008); *see, e.g.*, Miller v. State, 636 So. 2d 144, 150 (Fla. Dist. Ct. App. 1994) ("The doctrine of transferred intent operates to transfer the defendant's intent with respect to the intended victim to the unintended victim." (citing Mordica v. State, 618 So. 2d 301, 305 (Fla. Dist. Ct. App. 1993))). *But see* People v. Lee, 34 Cal. Rptr. 2d 723, 729 (Cal. Ct. App. 1994) (transferred intent should not apply in an assault case since a defendant is not required to have the intention to strike any particular person to be guilty of an assault, "and it is therefore irrelevant whether the defendant strikes the intended victim or another person").

> person and the individual attempting harm is held criminally liable as if he both intended to harm and did harm the same person.[107]

The theory of transferred intent has been referred to as a "legal fiction" deployed to ensure that a criminal defendant is held fully accountable for her crime.[108] It has typically been used in "so-called 'bad aim' situations where a defendant, while intending to kill one person, accidentally kills an innocent bystander or another unintended victim."[109]

In tort law, the elements of an intentional tort may be met notwithstanding the fact that the victim harmed was not the actor's intended victim.[110] Referred to by one scholar as an "ancient common-law fiction that continues to be recognized as an active part of American tort law," the doctrine in tort law is "described in casebooks and treatises, tested on bar examinations, asserted by attorneys on behalf of clients, discussed and applied by courts, and is even acknowledged by the American Law Institute."[111] Although its continued viability has been questioned,[112] and even Dean Prosser has made reference to the doctrine as a "curious survival of the antique law,"[113] the doctrine has been and remains a mainstay of the American common law of torts. Driven by the basic principle that "[t]he intention follows the bullet,"[114] the doctrine has been justified in policy terms, so as to articulate the "tendency to impose liability more easily and more broadly on a defendant whose conduct was intended to do harm than on a defendant who was merely negligent," where the "extensive liability can be justified either on the basis of the possible violation of the criminal law involved or simply on the antisocial and immoral nature of a defendant's behavior."[115] Thus, because "[a]n intentional wrongdoer is not

---

107. State v. Mullins, 602 N.E.2d 769, 771 (Ohio Ct. App. 1992).

108. People v. Czahara, 250 Cal. Rptr. 836, 839 (Cal. Ct. App. 1988).

109. State v. Fekete, 901 P.2d 708, 714 (N.M. 1995) (citing State v. Wilson, 863 P.2d 116, 121 (Wash. Ct. App. 1993), *rev'd in part*, 883 P.2d 320 (Wash. 1994) ("The doctrine of transferred intent was created to avoid the specific intent requirement and thus hold the defendant accountable for the consequences of his behavior when he injures an unintended victim.")).

110. *See* 6 AM. JUR. 2D *Assault and Battery* § 20 (2008); *see, e.g.*, Niehus v. Liberio, 973 F.2d 526, 533 (7th Cir. 1992) ("If A aims at B, and hits C, C can sue A for battery, even though he was not the intended victim and even though battery is an intentional tort.").

111. Vincent R. Johnson, *Transferred Intent in American Tort Law*, 87 MARQ. L. REV. 903, 903-06 (2004).

112. *Id.* at 907 n.8, 908 (questioning whether the concept of transferred intent should "continue to be indulged when ordinary, honest negligence principles are usually sufficient to provide a clear path to compensation," and noting that one author has described transferred intent as being "unnecessary because the same result of imposing liability for an intentional tort can be achieved by other means") (citing Osborne M. Reynolds, *infra* note 115, at 529).

113. William L. Prosser, *Transferred Intent*, 45 TEX. L. REV. 650, 650 (1967).

114. *Id.* at 650 (quoting State v. Batson, 96 S.W.2d 384, 389 (Mo. 1936)).

115. Osborne M. Reynolds, Jr., *Transferred Intent: Should Its "Curious Survival" Continue?*,

considered entitled to invoke the defense that the harm he caused was merely an unintended accident," and despite the fact that "the requirement of causation is basically the same in tort cases founded on wrongful intent as in cases based on negligence, the courts as a matter of policy will allow liability to be imposed for more remote consequences in the cases of wrongful intent."[116]

Assuming this principle were to be consciously applied to Title VII liability, it would appear that, because the City tried to effectuate a decision so as to ensure that not just Caucasians, but African Amerians and other minority groups were promoted as well, it intentionally took aim at the test. To the extent that anyone was adversely affected by the City's refusal to certify the examination results, and he was African American, or Hispanic like Lieutenant Vargas, then allowing that person to sue under Title VII for intentional disparate treatment based on race would create a legal fiction whereby the City's race consciousness and intent to deny a benefit to a group that was predominantly Caucasian is transferred to that plaintiff, regardless of whether he is Caucasian, African American or "other."

Courts and jurists have, throughout the tortured history of Title VII jurisprudence, attempted to distinguish between "discrimination in the air," as opposed to "discrimination brought to ground and visited upon an employee,"[117] signifying that "plaintiffs, in order to prevail [on a disparate treatment theory] . . . must prove that they have been victims of intentional race discrimination. As with negligence, discrimination 'in the air, so to speak, will not do'" when it comes to assigning liability.[118] In light of the fact that transferred intent has made its way into Title VII jurisprudence—inasmuch as the law permits a plaintiff a viable cause of action where the decision maker does not look at his or her protected class status at all—there is an argument to be made that this application is misplaced.

---

50 OKLA. L. REV. 529, 531 (1997).

116. Reynolds, *supra* note 115, at 531 (citing Ralph S. Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586, 588 (1933); LEON GREEN, RATIONALE OF PROXIMATE CAUSE 170 (1927)).

117. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989); *see also* Randle v. LaSalle Telecomms., 876 F.2d 563, 569 (7th Cir. 1989) (holding that the employer's accused discriminatory practices were not based on race, as the court recognized the *Hopkins* Court's finding that "[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision"); Williams v. United Dairy Farmers, 20 F. Supp. 2d 1193, 1199-1200 (S.D. Ohio 1998) (finding that direct evidence of racial animus existed, and employee plaintiffs had established a prima facie case under Title VII where two supervisors, who had uttered racial remarks and began a racially-motivated campaign to have the plaintiffs fired, were "meaningfully involved" in the employees' discharge).

118. Randle v. LaSalle Telecomms., 697 F. Supp. 1474, 1479 (N.D. Ill. 1988), *aff'd*, 876 F.2d 563 (7th Cir. 1989) (citing F. POLLOCK, LAWS OF TORTS 468 (13th ed. 1920)).

On the other hand, where race-conscious decisions are motivated by outright animus against a protected class sought to be benefited by Title VII—like the example given earlier about Asian Americans[119]—the broad remedial goals of the legislation and other pieces of legislation like it would point toward a victory in court for anyone adversely affected by the animus. The alternative is to write off those who are not members of a protected class contemplated by the decision maker as collateral damage of sorts. It is not a far stretch to apply the doctrine of transferred intent to Title VII jurisprudence, or to antidiscrimination jurisprudence generally, for that matter. The question at hand, however, before one can consider whether such a step is prudent, is whether it is an application that the Supreme Court was wholly cognizant and supportive of when it drafted *Ricci*, and the answer seems to be no.

However, the ramifications of this assertion are substantial. To the extent that a decision to fire, hire, promote, or even to spare someone *from* an adverse action may be deemed race-based or race-cognizant, others who are adversely affected may sue under a disparate treatment theory pursuant to Title VII, regardless of whether their protected class status played any role in the decision. It is not difficult to imagine a scenario in which an employer, to stave off a claim of discrimination under Title VII, opts to impact one employee rather than another under circumstances that, buttressed by ample testimony, may be deemed race-based, or even class-based.

Could Title VII have been contemplated by those who passed it to afford a right of action to individuals who were evaluated with an eye toward not what their class status is, but rather toward what it is not? Despite the broad remedial goals of Title VII, evinced by its legislative history, the plain language of the statute does not suggest this result. These and other questions, however, will need to be answered as litigators look closely at the premise assumptions, language, and underpinnings of *Ricci*, and present lower courts nationwide with new and potentially troubling theories of suit.

B. TITLE VII AND STANDING

It is crucial to recognize that so-called third party standing cases and other cases in which those whose protected class status was not itself a factor in their treatment have largely been grouped together. There are, however, several different bases upon which a claim may be said to lie or not lie where the victim's class status was not necessarily implicated by the

119. *See* discussion *supra* p. 768.

decision or treatment at issue. For example, one plaintiff may recover for sexual harassment that she was harmed by witnessing, but did not experience herself. Another plaintiff may successfully allege that due to discrimination against a racial group to which he does not belong, he has lost associational rights and privileges with members of that group and has been harmed by that loss. A third plaintiff may have a cognizable claim when he earns a lower wage than he should due to the fact that he works in a field that is predominantly female and holds a job title whose prestige has been tarnished by gender discrimination against women, although he is male.

It is important to recognize the range and various categories of cases in which one's own protected class status is not alleged to have engendered the harm one sustained, but rather animus or discrimination directed at a class to which the plaintiff does *not* belong. There have only, however, been a handful of cases like *Ricci*, in which members of a group alleged a harm that stemmed from sensitivity or animus toward another protected class status. A closer look at the relationship between Title VII and standing becomes necessary prior to sorting out these cases.

In the midst of the media firestorm swirling around the cross-allegations of racism, the city of New Haven's attempt to straddle a thin, and some might say illusory, line between disparate treatment and disparate impact and the Court's pronouncement of a standard for evaluating whether an entity has run afoul of Title VII when attempting to accommodate competing interests, *Ricci* overlooked something very significant. It appears as though the Supreme Court decided a very important issue that has split and confused courts, but it did not formally elucidate this decision or even explicitly acknowledge that it was making a decision.

Title VII provides a private right of action for one "claiming to be aggrieved . . . by [an] alleged unlawful employment practice."[120] The word "aggrieved" has been held by many courts to be a question of standing, and such questions "often turn[] on the nature and source of the claim asserted."[121] The issue of whether Congress intended Title VII standing to be as broad as Article III standing[122] has not yet been taken up by the Supreme Court.[123] It is the case, then, that "[t]he scope of Title VII's private right of action . . . depends on whether Congress intended to insulate

120. 42 U.S.C. § 2000e-5(f)(1) (2006).

121. Warth v. Seldin, 422 U.S. 490, 500 (1975).

122. For a thorough explanation of Article III standing, see Annotation, *Substantial Interest: Standing*, CRS ANNOTATED CONSTITUTION, http://www.law.cornell.edu/anncon/html/art3frag16_user.html (last visited Jan. 12, 2010).

123. Leibovitz v. N.Y. City Transit Auth., 252 F.3d 179, 186 (2d Cir. 2001).

such an action from prudential concerns."[124]

Prudential standing is the issue of "'whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.'"[125] The Supreme Court has never ruled on the issue of whether prudential standing limits the right of action under Title VII; however, several lower courts have addressed the issue.[126]

Scholars have taken note of what they call "transferred impact sexual harassment cases," in which individuals not directly targeted by harassers are permitted to bring suit nonetheless because of the effect of that harassment on them in the workplace.[127] In this vein, it is useful to look to a case like *Childress v. City of Richmond*,[128] a 1997 Fourth Circuit case that

---

124. Leibovitz v. N.Y. City Transit Auth., 252 F.3d 179, 186 (2d Cir. 2001).

125. *Id.* at 185 (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).

126. *E.g.*, *id.* at 186 (explaining that "[t]he scope of Title VII's private right of action . . . depends on whether Congress intended to insulate such an action from prudential concerns"); Bermudez v. TRC Holdings, Inc., 138 F.3d 1176, 1180 (7th Cir. 1998) (holding that a Caucasian female employee lacked standing under Title VII to allege injury on behalf of African American applicants to an employment agency who were discriminated against because of race); Childress II, *infra* note 129, at 1209 (Luttig, J., concurring) (explaining that "Congress may, if it chooses, override prudential standing limitations and authorize all persons who satisfy the Constitution's standing requirements to bring particular actions in federal court" and finding that "because the white male plaintiffs in the present case assert only the rights of third-parties to be free from race or sex-based discrimination in the workplace, they have not stated a cause of action under Title VII"); Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 46 (2d Cir. 1997), *rev'd on other grounds*, Zervos v. Verizon N.Y., 252 F.3d 163 (2d Cir. 2001) ("The [defendant] appropriately looks to the [Rehabilitation Act's] language to determine whether Congress granted an express right of action to persons who otherwise would be barred by prudential standing rules.").

127. *See, e.g.*, Robert J. Aalberts & Lorne H. Seidman, *Should Prudential Standing Requirements Be Applied in Transferred Impact Sexual Harassment Cases? An Analysis of Childress v. City of Richmond*, 26 PEPP. L. REV. 261 (1999) (asserting that Title VII needs to afford third-party standing in title VII race discrimination cases); Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 66-67 (2002) (arguing that "[t]he law should encourage and protect workers who reject discriminatory relationships and who instead adopt Title VII's vision of workplace equality and its catalytic role in eroding other forms of discrimination," and that "[i]f Title VII cannot forbid that invitation and defend the officers who spurned it, then antidiscrimination law misses an opportunity to promote the spontaneous, rank-and-file embrace of Title VII values," because "[w]ithout such protection, employees can be expected to take the path of least resistance and acquiesce in discriminatory workplaces, indeed to develop an investment in them"). *But cf.* Leibovitz v. N.Y. City Transit Auth., 252 F.3d 179, 186 n.5 (2d Cir. 2001) (finding that a plaintiff possessed standing to bring a hostile work environment claim despite the fact that she, herself had not been a direct target of the harasser, and that her "injury [wa]s sufficient to establish standing under Article III," because it was "distinct and palpable").

128. Childress v. City of Raymond, 120 F.3d 476 (4th Cir. 1997), *vacated*, 134 F.3d 1205 (4 Cir. 1998) (en banc) [hereinafter Childress I].

generated division within the court as to the interplay between standing and antidiscrimination law.

In *Childress*, the plaintiffs, Caucasian male police officers, alleged that they had been subjected to a hostile environment and retaliation in violation of Title VII after a supervisor "repeatedly made disparaging remarks to and about female and black members of the police force that adversely affected vital relationships and working conditions within the force."[129] A three-judge panel of the Fourth Circuit held that police officers who were Caucasian and male could sue for sexual harassment under Title VII after their colleagues, who were female and African American, were harassed in their presence and conflict ensued.[130]

Upon a rehearing en banc, the court vacated this decision on the basis that it improperly necessitated a mandate of the same-sex hostile environment theory of sexual harassment.[131] This point of law was later obviated by the Supreme Court in *Oncale v. Sundowner Offshore Services*,[132] which held that same-sex sexual harassment was, in fact, actionable,[133] causing scholars to maintain that "the holding in *Childress* . . . may pose considerable problems for employers that could spread with significant consequences," despite its having been vacated.[134] Of particular note was a concurring opinion signed on to by three judges, which stated:

> Congress . . . was not writing on a clean slate when it authorized "aggrieved persons" to bring Title VII actions. In the law, the phrase "aggrieved person" has long been a "term of art" ordinarily understood to mean those persons who could satisfy both prudential and constitutional standing limitations. . . . Among the prudential limits on standing is not only the "zone of interests" requirement, but also, of course, the general prohibition against third-party standing. . . . Congress may, if it chooses, override prudential standing limitations and authorize all persons who satisfy the Constitution's standing requirements to bring particular actions in federal court. But where it has not done so, and instead has simply invoked the term of art

129. Childress v. Richmond, 134 F.3d 1207 (4th Cir. 1998) (per curiam) [hereinafter Childress II].

130. Childress I, *supra* note 128, at 478.

131. Childress II, *supra* note 129, at 1207.

132. Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998).

133. *Id.* at 79-80 (noting that Title VII's protection from sexual harassment "must extend to sexual harassment of any kind that meets the statutory requirements").

134. Aalberts & Seidman, *supra* note 127, at 262-63 (concluding that "in light of the *Oncale* decision, courts ruling in future *Childress* type transferred impact cases will no longer be able to dismiss based on that theory, and will instead be compelled to address the issue of judicial standing").

> "aggrieved person," the default rule generally is that Congress has created a cause of action only for those persons who can satisfy both types of standing requirements—constitutional and prudential.[135]

The concurrence reasoned that, "in order to qualify as a 'person aggrieved' . . . , a plaintiff must be a member of the class of direct victims of conduct prohibited by Title VII, that is, the plaintiff must assert his own statutory rights . . . ."[136] Thus, the concurrence concluded, "because the white male plaintiffs . . . assert only the rights of third-parties to be free from race or sex-based discrimination in the workplace, they have not stated a cause of action under Title VII."[137]

The confusion evinced by the judges in the *Childress* case as to precisely how or why the case should or should not be permitted to proceed, it has been noted, has "ranged from granting judicial standing to the *Childress* plaintiffs to denying it, with three appellate judges, in a concurring opinion, making a distinction between the prudential standing requirements of Title VII and Title VIII of the Civil Rights Act of 1968."[138] Much of the confusion that still inheres on this subject may be traced back to courts' application of a Supreme Court opinion on standing that arose in the context of a Title VIII claim.

In 1972, in *Trafficante v. Metropolitan Life Insurance Corp.*,[139] the Supreme Court found that both a Caucasian tenant and an African American tenant had standing to sue the owner of the apartment complex in which they all resided under § 810 of the Fair Housing Act[140] (Title VIII), which provided, at the time, that "[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur . . . may file a complaint with the Secretary [of Housing and Urban Development]."[141]

The plaintiffs alleged that, due to racial discrimination against minority groups in the rental of apartments in the complex in which they all resided, they had incurred three injuries: (1) the loss of the social benefits that they should have derived from living in a community that was racially

---

135. Childress II, *supra* note 129, at 1208-09 (Luttig, J., concurring).

136. *Id.* at 1209 (Luttig, J., concurring).

137. *Id.* (Luttig, J., concurring).

138. Aalberts & Seidman, *supra* note 127, at 263.

139. Trafficante v. Metro. Life Ins. Corp., 409 U.S. 205 (1972).

140. 42 U.S.C. § 3610 (2006).

141. *Trafficante*, 409 U.S. at 212; *see also* Act of Apr. 11, 1968, Pub. L. No. 90-285, 82 Stat. 85 (repealed 1988) (codified as amended at 42 U.S.C. § 3610(a) (2006)).

integrated; (2) the loss of business and professional advantages that would have inured to them as a result of living in a diverse and integrated community; and (3) the shame and the economic damage that inured to them as a result of living in what was deemed a "white ghetto."[142] The Court held that "the loss of important benefits from interracial associations" sufficed as an allegation of injury so as to confer standing on plaintiffs of all races.[143] According to the Court, after examining the legislative history of the statute, "the proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered,"[144] and the "person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, 'the whole community.'"[145]

Trafficante then became widely cited in a variety of cases involving concerns about standing, injury, and whether a decision was made or harm or an injury conferred "because of" protected class status, without much regard for the factual and legal differences among these different cases. Three years after *Trafficante* was decided, Justice White, in a dissenting opinion in *Sosna v. Iowa* noted that "Congress has expressed an intention and provided that any person 'claiming to be aggrieved' could bring suit under Title VII to challenge discriminatory employment practices" because

> any discrimination in employment based upon sexual or racial characteristics aggrieves an employee or an applicant for employment having such characteristics by stigmatization and explicit or implicit application of a badge of inferiority, [and] Congress gave such persons standing by statute to continue an attack upon such discrimination even though they fail to establish particular injury to themselves in being denied employment unlawfully.[146]

This comment, however, seems to address itself to scenarios in which prospective plaintiffs share traits or characterizations with those in a protected class that lead to their similar stigmatization, despite the fact that the plaintiffs have incurred no harm personally. In the *Ricci* scenario, however, the only thing that plaintiffs of different ethnicities or races would share is the circumstance of having succeeded on the exam at issue, and all of the plaintiffs would be able to claim the same injury: their failure to receive the promised promotion.[147] The question thus remains as to

142. Trafficante v. Metro. Life Ins. Corp., 409 U.S. 205, 208 (1972).

143. *Id.* at 209-10.

144. *Id.* at 210.

145. *Id.* at 211 (citing 114 CONG. REC. 2706 (1968) (statement of Sen. Javits)).

146. Sosna v. Iowa, 419 U.S. 393, 413 n.1 (1975) (White, J., dissenting).

147. The majority and dissenting justices in *Ricci v. DeStefano* disagreed over whether actual

whether *Ricci* indeed lays the groundwork for the incorporation of "transferred intent" into Title VII jurisprudence.[148] The most extreme case arises with respect to those who share neither class-rooted characteristics nor stigmatization with the protected class being discriminated against.

More than one circuit's court of appeals has "applied *Trafficante* to the workplace context, ruling that Title VII's phrase 'person claiming to be aggrieved,' . . . allows 'third-party' standing to the fullest extent permitted by Article III's case or controversy requirement."[149] Several circuits have pointed out similarities between Title VII and the Fair Housing Act, with the Seventh Circuit noting that

> [b]oth take broad aim at discrimination in their respective sectors and in that sense are the functional equivalents of one another; . . . both authorize individuals to bring suit for statutory violations and in this way to act as "private attorneys general," . . . and in permitting any

---

injury existed from the City's decision to discard the exams. Justice Kennedy, writing for the majority, stated that "[t]he injury arises in part from the high, and justified, expectations of the candidates who had participated in the testing process on the terms the City had established for the promotional process." Ricci v. DeStefano, 129 S. Ct. 2658, 2681 (2009). Because of the substantial time and money that candidates committed to preparing for the exam, the majority believed that "the injury caused by the City's reliance on raw racial statistics at the end of the process was all the more severe." *Id.* Justice Ginsburg, in her dissent, however, downplayed this possible repercussion of discarding the exams despite the employees' legitimate expectations, stating that "it [is] more regrettable to rely on flawed exams to shut out candidates who may well have the command presence and other qualities needed to excel as fire officers." *Id.* at 2710 (Ginsburg, J., dissenting).

148. *See* Lyman v. Nabil's Inc., 903 F. Supp. 1443, 1447 (D. Kan. 1995) (stating that "[Title VII] does not specifically address whether an unlawful [employment action] directed at a person in a protected class is actionable by a person who, although outside the protected class, is allegedly injured by the unlawful practice"); *see also* Zatz, *supra* note 127, at 63. Zatz explains that:

> [t]he . . . tendency, away from broad Article III standing and toward specific recognition of interests in intergroup association or freedom from work in a non-discriminatory environment, is . . . problematic. To the extent that injury to these interests would itself give plaintiffs a cause of action, the theory threatens to become untethered from Title VII's language, which requires a showing that an employer discriminated against an individual because of his or her own race or sex. [The] conclusion that Title VII confers a "right to work in an atmosphere free of discrimination and to enjoy myriad benefits of associating with members of other racial or ethnic groups," would make the Title VII violation, not just standing to sue, turn on "emotional or psychological injury to the plaintiff herself" without showing either that this injury occurred because of plaintiff's race or sex or that some other employee was discriminated against because of race or sex.

Zatz, *supra* note 127, at 92 (quoting Clayton v. White Hall Sch. Dist., 778 F.2d 457, 459 (8th Cir. 1985)).

149. Palmer v. Occidental Chem. Corp., 356 F.3d 235, 237-38 (2d Cir. 2004) (declining to determine whether *Trafficante* applies to a Title VII claim of denial of interracial association in the workplace) (citing Anjelino v. N.Y. Times Co., 200 F.3d 73 (3d Cir. 1999); EEOC v. Miss. Coll., 626 F.2d 477 (5th Cir. 1980); Waters v. Heublein, Inc., 547 F.2d 466 (9th Cir. 1976); Gray v. Greyhound Lines, E., 545 F.2d 169 (D.C. Cir. 1976)).

> person aggrieved by a violation to file a charge and suit, both reflect a congressional intent to extend standing to the fullest extent permitted by Article III of the Constitution.[150]

In any event, however, would *Trafficante* extend to *any* Title VII case that implicates standing?[151] Courts applying *Trafficante*, interestingly, have referred to it as the Supreme Court's first recognition of "the viability of a claim for denial of interracial association."[152] Indeed, one circuit court called *Trafficante* "the seminal associational standing case in the race discrimination context."[153] This makes *Trafficante*'s significance less than clear in cases in which one's right to a diverse workplace or associational rights are not threatened—cases like *Ricci*.[154] In very recent jurisprudence, in fact, courts have cautioned that "[l]anguage in cases . . . that standing under Title VII was intended to be as broad as Article III permits, must be taken in context."[155]

---

150. Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289, 297-98 (7th Cir. 2000) (holding that so-called employment "testers" who experience discrimination when applying for positions have standing to sue the prospective employers under Title VII, despite the fact that they never genuinely sought employment); *see, e.g.*, Anjelino v. N.Y. Times Co., 200 F.3d 73, 90 n.23 (3d Cir. 1999) (noting that "Title VIII is analogous to Title VII"); Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 935 (2d Cir. 1988) ("More persuasive is the parallel between Title VII and Title VIII noted by both courts and commentators.") (citing United States v. Starrett City Ass'n, 840 F.2d 1096, 1101 (2d Cir. 1988)); *Miss. Coll.*, 626 F.2d at 482 (noting that "the strong similarities between the language, design, and purposes of Title VII and the Fair Housing Act require that the phrase 'a person claiming to be aggrieved' in § 706 of Title VII must be construed in the same manner that *Trafficante* construed the term 'aggrieved person' in § 810 of the Fair Housing Act") (citing EEOC v. Bailey Co., 563 F.2d 439, 450-54 (6th Cir. 1977)); *see also* Elliot M. Mincberg, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128, 158-60 (1976).

151. In *Lyman v. Nabil's Inc.*, 903 F. Supp. 1443 (D. Kan. 1995), the court stated that "[Title VII] does not specifically address whether an unlawful business practice directed at a person in a protected class is actionable by a person who, although outside the protected class, is allegedly injured by the unlawful practice." *Lyman*, 903 F. Supp. at 1447.

152. Palmer v. Occidental Chem. Corp. 356 F.3d 235, 237 (2d Cir. 2004); *see also* EEOC v. Bailey Co., 563 F.2d 439, 439, 454 (6th Cir. 1977) (holding that a white plaintiff could challenge her employer's discrimination against African Americans because the discrimination implicated her interest in an integrated workplace). The court noted:

> [T]he EEOC has interpreted Title VII to confer upon every employee the right to a working environment free from unlawful employment discrimination. Under the EEOC's interpretation of Title VII, whites are aggrieved by discrimination against blacks at their place of employment and have standing to file charges with the EEOC and sue in court..

Id.

153. Anjelino v. N.Y. Times Co., 200 F.3d 73, 90 (3d Cir. 1999).

154. *See* Zatz, *supra* note 126, at 87 ("[C]ourts drawing on *Trafficante* for Title VII purposes have [shown] ambivalence between broad Article III standing and standing based on a specific interest in interracial associations.").

155. Thompson v. N. Am. Stainless, LP, 567 F.3d 804, 817 n.1 (6th Cir. 2009); *see also* Zatz, *supra* note 126, at 92 ("Broad standing separates injury from discrimination, permitting a wide class of injured plaintiffs to sue, but only when employment discrimination can be proven against

Thus, when a male plaintiff sued his former employer under Title VII, alleging that he had been retaliated against after his fiancée filed a gender discrimination charge, the court said that *Trafficante* cannot

> properly be read to say that any person affected by the imposition of retaliation should be deemed sufficiently aggrieved to bring a Title VII claim. While Title VII can be interpreted to protect the right of people to associate with people of different races, it can hardly be interpreted to protect the right of people to associate with people who have been retaliated against.[156]

This raises further questions about when so-called third-party standing is and should be afforded, and necessitates a breakdown of the various types of third-party cases. Clearly, not all of them will fall into the *Ricci* model, whereby at least one plaintiff suffered an alleged harm despite his protected class status but only because of attention paid to others' races.

C. DOES A PLAINTIFF HAVE STANDING TO SUE UNDER TITLE VII AFTER WITNESSING DISCRIMINATION AGAINST SOMEONE ELSE?

In *Leibovitz v. New York City Transit Authority*,[157] the female plaintiff who had not herself been harassed, but who alleged she was harmed nonetheless by the harassment of others, attempted to sue her employer under Title VII for sexual harassment.[158] The Court found that the plaintiff had standing to sue because her injury was not "vicarious" but rather resulted from the plaintiff's own work situation.[159] Contrasting Leibovitz's case with those in which plaintiffs assert rights on behalf of others, the Second Circuit found that the plaintiff shared a protected class status with those whom she alleged had been discriminated against, and that the factual issue that her case turned upon was whether she herself had sustained any psychological harm because her personal work environment was hostile as a result of discrimination inflicted upon other women.[160] The court thus declined to decide the issue of whether prudential concerns limit standing under Title VII.[161]

It is vital, however, to distinguish between cases in which a plaintiff is

---

someone else.").

156. Thompson v. N. Am. Stainless, LP, 567 F.3d 804, 817 n.1 (6th Cir. 2009).

157. Leibovitz v. N.Y. City Transit Auth., 252 F.3d 179, 185-88 (2d Cir. 2001).

158. *Id.* at 181-82 (noting that the plaintiff claimed that "she suffered a major depressive disorder" working for her employer who had an "inadequate response" to alleged sexual harassment taking place in "other parts of her workplace").

159. *See id.* at 183, 188.

160. *Id.* at 186.

161. *Leibovitz*, 252 F.3d at 186.

suing for his or her own harm sustained by discrimination and those cases in which he is suing for harm that may be called derivative, in that it inured to him or her by virtue of having witnessed discrimination against others. In cases in which plaintiffs have alleged that witnessing discrimination against others injured them by poisoning their work environments and making them hostile, courts have divided over the issue of standing, with some courts finding that "[s]tanding for purposes of Title VII is not limited to minority groups. Rather, it is dependent upon whether the plaintiff is a person claiming to be aggrieved by such discrimination."[162]

However, other courts have found that "*Trafficante* did not abolish all limits on third-party standing in civil rights cases," and that so-called third-party discrimination does not always warrant the conferral of standing to the so-called third-parties who witness and object to discrimination against others.[163] In *Bermudez v. TRC Holdings, Inc.*,[164] the Seventh Circuit held that a Caucasian female plaintiff lacked standing under Title VII to allege that her coworkers either were themselves biased against African Americans or tolerated clients' racial prejudices in placement of workers.[165] Observing that "[n]one of the comments was directed against her personally," the court held that "[a]lthough the comments . . . reflect actionable discrimination against applicants for employment, a reasonable person in [the plaintiff's] position would have found them 'merely offensive', because they posed no threat to her personally."[166] The court contrasted this holding with its holding in a previous case, noting that it had previously held that a "white employee could be aggrieved by the lack of black employees in the workplace if that produced 'the loss of important benefits from interracial associations,' but this was a personal loss []which must be proved rather than just asserted."[167]

Thus, many cases have adjudicated scenarios in which plaintiffs claim

---

162. Clayton v. White Hall Sch. Dist., 875 F.2d 676, 679-80 (8th Cir. 1989) (holding that a white employee had standing to sue for a racially discriminatory work environment); *see also* Parham v. Sw. Bell Tel. Co., 433 F.2d 421, 425 (8th Cir. 1970) ("Title VII of the Civil Rights Act of 1964 is to be accorded a liberal construction in order to carry out the purpose of Congress to eliminate the inconvenience, unfairness and humiliation of racial discrimination."). *But see* Lyman v. Nabil's Inc., 903 F. Supp. 1443, 1447 (D. Kan. 1995) ("Most courts that have considered the question seem to hold that males lack standing to sue because they are not 'persons aggrieved' under Title VII when they seek redress for injuries suffered due to alleged discrimination directed at women.").

163. Bermudez v. TRC Holdings, Inc., 138 F.3d 1176, 1180-81 (7th Cir. 1998) (citing Warth v. Seldin, 422 U.S. 490 (1975)); Allen v. Wright, 468 U.S. 737 (1984)).

164. *Bermudez*, 138 F.3d at 1176.

165. *Id.* at 1180-81.

166. *Id.* at 1181.

167. *Id.* at 1180 (quoting Stewart v. Hannon, 675 F.2d 846, 850 (7th Cir.1982)).

to have been harmed from their proximity to racism, discrimination, and harassment, with some finding that the plaintiffs may bring suit[168] and others finding that they may not.[169] Numerous other cases have held that the loss of association with members of discriminated-against classes may afford Title VII standing to non-class members.[170]

Ricci, however, is not a case in which members of one protected class were discriminated against while members of other classes were forced to stand by and witness it; it is a case in which members of more than one group all suffered the fate of the City refusing to certify the results of an exam on which they had done well. This scenario necessitates the examination of a group of cases that ask whether a plaintiff has standing to sue under Title VII where he or she is swept up in discrimination against another group, such that his or her harm is identical to that of the group members.

---

168. *See, e.g.*, Childress I, *supra* note 128, at 481 ("*Trafficante* [] . . . has been adopted by every court of appeals that has considered the issue of a white person's standing to sue under Title VII for associational or hostile environment claims flowing from discriminatory conduct directed at black persons."); Gray v. Greyhound Lines, E., 545 F.2d 169, 175 (D.C. Cir. 1976) (holding that the African American plaintiff, claiming that "his mental state" was impaired and that he felt "isolat[ed] as a result of being one of the favored blacks who had slipped through the allegedly discriminatory screening practices," had standing, where the defendant's hiring practices "excluded blacks from employment as bus drivers").

169. *See, e.g.*, Blanks v. Lockheed Martin Corp., 568 F. Supp. 2d 740 (S.D. Miss. 2007) (holding that a Caucasian employee who sought to recover damages for emotional distress after he witnessed a Caucasian racist shoot his African American coworkers and friends lacked standing to bring suit under § 1981).

170. *See, e.g.*, Stewart v. Hannon, 675 F.2d 846, 849 (7th Cir. 1982) (finding that a white woman had standing where the complaint alleged that she was subjected to a work environment where racial discrimination persisted, and which prevented her from the benefits of interracial association). In *Waters v. Heublein, Inc.*, 547 F.2d 466, 469 (9th Cir. 1976), the court opined:

> [I]nterpersonal contacts—between members of the same or different races—are no less a part of the work environment than of the home environment. Indeed, in modern America, a person is as likely, and often more likely to know his fellow workers than the tenants next door or down the hall. The possibilities of advantageous personal, professional or business contacts are certainly as great at work as at home. The benefits of interracial harmony are as great in either locale. The distinction between laws aimed at desegregation and laws aimed at equal opportunity is illusory. These goals are opposite sides of the same coin.

Waters, 547 F.2d at 469. In accord was *EEOC v. Miss. Coll.*, 626 F.2d 477, 482-83 (5th Cir. 1980), which said:

> Although Summers' amended charge fails to disclose the specific injury that she suffered because of the College's alleged racially discriminatory practices, we accept the argument of the EEOC that Summers could claim that the discrimination deprived her of the benefits arising from association with racial minorities in a working environment unaffected by discrimination.

Miss Coll., 626 F.2d at 482-83. *See also* EEOC v. Bailey Co., 563 F.2d 439, 451-54 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978) (holding that an individual may be a considered "a person claiming to be aggrieved" under Title VII, and thus have standing, where a white woman had possibly suffered from the loss of benefits that stemmed from her not being able to associate with racial minorities at work because of her employer's discriminatory practices).

D. STANDING TO SUE UNDER TITLE VII WHEN DISCRIMINATION AGAINST ANOTHER GROUP RESULTS IN HARM TO PLAINTIFF

This scenario—as opposed to one in which a plaintiff witnessed another's discrimination or harassment, shared class-rooted traits with those who were discriminated against or harassed, or lost associational rights with members of different classes—seems to be that presented in *Ricci*. The question may be broken down in one of several ways. On one level, one might ask whether any individual Caucasian plaintiff's race in any way brought about the harm that he sustained, and to the extent that their races did not, whether they may be said to have been the victims of disparate treatment.

Some scholars have wondered whether perhaps a claim for systemic disparate treatment would have been a better, or at least a more accurate route, for these plaintiffs. Such a case, however, would have most likely been brought as a class action suit alleging that the City engaged in a "pattern or practice" of intentional discrimination, meaning that racial discrimination "was the employer's standard operating procedure rather than a sporadic occurrence."[171] According to Professor Michael Zimmer, it cannot be said in this case that a policy was implemented whereby a clear racial line could be drawn between those benefited and those harmed.[172] Rather, Professor Zimmer argues that, in *Ricci,* African Americans, Hispanics, and Caucasians—"fall on both sides of the line and there is no express policy to discriminate . . . . [N]ot all members of one racial group were on one side of the line . . . and . . . there was no express policy drawing any racial division."[173] Moreover, Professor Zimmer argues that it is similarly "not clear that the systemic disparate treatment cases based on statistical evidence proving the employer had an intentionally discriminatory employment practice support the holding in *Ricci*."[174] Whereas the seminal cases of *Teamsters* and *Hazelwood School District* contained statistics that established discriminatory intent, he argues, in *Ricci* the Caucasian plaintiffs made up "only 25% of all the whites who took the test."[175] Thus, he concludes, the statistics in *Ricci* alone are "unlikely to

171. Allison v. Citgo Petroleum Corp. 151 F.3d 402, 409 (5th Cir. 1998) (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977)).

172. Posting of Professor Michael Zimmer to Conflicting Opinions, http://www.concurringopinions.com/archives/2009/11/ricci-color-blind-standards-in-a-race-conscious-society.html (Nov. 20, 2009, 8:49 CST).

173. *Id.*

174. *Id.*

175. Posting of Professor Michael Zimmer to Conflicting Opinions, http://www.concurringopinions.com/archives/2009/11/ricci-color-blind-standards-in-a-race-conscious-society.html (Nov. 20, 2009, 8:49 CST).

support drawing an inference of intentional race discrimination against the members of any of the . . . groups without drawing the same inference as to the members of each of the . . . groups. That would not be disparate treatment discrimination."[176]

Nevertheless, the Caucasian plaintiffs were able to demonstrate disparate treatment in violation of Title VII. The more salient question one might ask, specifically with respect to Lieutenant Vargas or a hypothetical African American plaintiff, is whether disparate treatment alleged to be aimed at a group of which one is not a member, that causes one harm due purely to shared circumstance, and not to shared traits or loss of associational rights, engenders a viable Title VII claim for that plaintiff. Despite the Supreme Court's failure to note this in *Ricci*, courts had seemingly split on the answer to this question prior to *Ricci*.

In *Anjelino v. New York Times Co.*,[177] the Third Circuit Court of Appeals held that the plaintiffs—male employees—had standing to sue under Title VII for sex discrimination against women where they alleged that they suffered pecuniary injury when they were included on a priority list among female employees, whom the defendant employer allegedly discriminatorily failed to hire.[178] The court acknowledged the general principle that "men do not have standing to bring claims of sex discrimination under Title VII," but subsequently noted three exceptions to the principle: "a cause of action may lie under Title VII if male employees are subjected to discrimination 'because they are men,' . . . if discrimination directed at women results in a loss of interpersonal contacts or associational rights with women," or "if sex-based discrimination results in pecuniary injury to both male and female workers."[179]

Recognizing its own history of interpreting the statutory language, "person claiming to be aggrieved," as implying "a Congressional intent to be liberal in allowing suits that effectuate the purposes of anti-discrimination statutes,"[180] the court held that the males had standing to sue under Title VII.[181] More generally, it held that "indirect victims of sex-

176. Posting of Professor Michael Zimmer to Conflicting Opinions, http://www.concurringopinions.com/archives/2009/11/ricci-color-blind-standards-in-a-race-conscious-society.html (Nov. 20, 2009, 8:49 CST).

177. Anjelino v. N.Y. Times Co., 200 F.3d 73 (3d Cir. 1999).

178. *See generally id.*

179. *Id.* at 89.

180. *Id.* at 91 (citing Novotny v. Great Am. Fed. Savings & Loan Ass'n, 584 F.2d 1235, 1240-45 (3d Cir. 1978) (permitting a male plaintiff, alleging that he was discharged for failing to adhere to a company policy of gender discrimination against women, to sue under 42 U.S.C. § 1985 (2006))).

181. *Anjelino*, 200 F.3d at 92.

based discrimination have standing to assert claims under Title VII if they allege colorable claims of injury-in-fact that are fairly traceable to acts or omissions by defendants that are unlawful under the statute."[182] Moreover, in dicta, it added that "where the alleged harm is pecuniary, a Title VII action should be characterized as involving direct discrimination, as opposed to indirect discrimination, even if the plaintiffs were not the objects of bias in the first instance."[183]

Similarly, in *Allen v. American Home Foods, Inc.*,[184] employees alleged that the defendants had closed the plant due to sex discrimination in light of the fact that the employee population was predominantly female.[185] Five of the fifty-one plaintiffs were males.[186] The court found that

> the scope of the language "person aggrieved" confers standing to all persons injured by an unlawful employment practice. These male plaintiffs allege such an injury, and thus have standing. This is as it should be. These males suffered the same injury as did the females that lost their jobs; the injuries of the males and females were occasioned by the same corporate decision; and if, as the plaintiffs allege, considerations of sex motivated the corporate decision to close the LaPorte plant, the corporate decision that injured the male plaintiffs constituted an unlawful employment practice under Title VII.[187]

In the 1988 case of *Pennsylvania Nurses Association v. Pennsylvania*,[188] the issue of standing arose when a class of nurses alleging gender discrimination against females with respect to retirement and workmen's compensation benefits turned out to have four named male plaintiffs. The court noted that, because the males had alleged that they were provided with "inferior retirement benefits and workmens' compensation coverage to plaintiffs due to the fact that the profession which plaintiffs practice is traditionally female-dominated," it was the case that "the male plaintiffs have been aggrieved by the sex-based discrimination directed toward the female plaintiffs," and "the injury suffered by the male plaintiffs confers standing on them to assert the instant

182. Anjelino v. N.Y. Times Co., 200 F.3d 73, 92 (3d Cir. 1999).

183. *Id.* at 92 n.26.

184. Allen v. Am. Home Foods, Inc., 644 F. Supp. 1553 (N.D. Ind. 1986).

185. *Id.* at 1554-55.

186. *Id.* at 1555.

187. *Id.* at 1557.

188. Pa. Nurses Ass'n v. Pennsylvania, No. 86-1586, 1991 WL 120200 (M.D. Pa. Aug. 4, 1988).

Title VII claim."[189]

None of these cases was addressed or cited in *Ricci*; the issue of whether actionable disparate treatment, whether excused or not, has occurred was never raised; rather, the fact was assumed. However, in lower court cases with factual scenarios paralleling *Ricci*'s, standing was not said to exist for those outside of the group being discriminated against, such that they could sue for disparate treatment under Title VII.

In *Patee v. Pacific Northwest Bell Telephone Co.*,[190] the Ninth Circuit held that male plaintiffs who complained of sex discrimination, alleging that, as part of a group which was predominantly female, they received less compensation than they should have, lacked standing to allege sex-based wage discrimination against women.[191] The court refused to apply *Trafficante*, asserting that the case "address[ed] the harmful impact on the plaintiff because of the denial of association with members of other groups."[192] In contrast, the court found in the case before it that the

> male employees do not claim that they have been denied interpersonal contacts with women or that the alleged sex-based wages discrimination has deprived them of harmonious relationships. In fact, most of their co-workers are women. The serious consequences that flow from the exclusion of persons because of discrimination in housing and in hiring are not present here.[193]

In fact, the court noted, "The male workers do not claim that they have been discriminated against because they are men . . . . [T]he male workers cannot assert the right of their female co-workers to be free from discrimination based on their sex."[194]

Similarly, in *Spaulding v. University of Washington*,[195] a male plaintiff who was employed alongside females as a member of the University's nursing faculty alleged that he was discriminated against with regard to his compensation due to sex-based discrimination directed against the women with whom he taught.[196] The Ninth Circuit, however, found that because he could not claim that he was compensated less because of his sex, he could

189. Pa. Nurses Ass'n v. Pennsylvania, No. 86-1586, 1991 WL 120200 (M.D. Pa. Aug. 4, 1988).

190. Patee v. Pac. Nw. Bell Tel. Co., 803 F.2d 476 (9th Cir. 1986).

191. *See generally id.*

192. *Id.* at 478.

193. *Id.* at 479.

194. *Id.* at 478.

195. Spaulding v. Univ. of Wash., 740 F.2d 686 (9th Cir. 1984).

196. *Id.* at 709.

not "bootstrap" his claim onto that of the women's.[197]

In *AFSCME v. County of Nassau*,[198] the court considered the issue of standing in the context of two male plaintiffs in a proposed class of those claiming to have worked in and been harmed economically by working in "traditionally female jobs," and being underpaid.[199] Arguing that "although they are men, . . . they are victims of the defendants' discrimination against women,"[200] the plaintiffs were denied standing nonetheless:

> It has oft been held that associational rights give rise to cognizable title VII claims. . . . That is to say, if Goldberg and Jordan alleged "that they have been denied interpersonal contacts with women," . . . they would state a claim under title VII. But, "[i]n fact, most of their co-workers are women." . . . They contend that they are aggrieved persons because, but for the defendants' alleged discrimination against women, they would be paid more. Goldberg and Jordan unquestionably "assert their own injuries" and "their own rights."[201]

This meant, the court found, "that these injuries and rights do not place them within the [T]itle VII zone of interests, because '[t]he male workers do not claim that they have been discriminated against because they are men.'"[202] The court explained that "[w]hile there is considerable appeal in [the] reasoning that 'the injuries of the males and females were occasioned by the same . . . decision,' . . . the fact remains that Goldberg and Jordan suffer no injury *qua* men,[203] and concluded that "the absence of injury to the men as men is a fatal flaw for [T]itle VII purposes."[204]

Furthermore, the court noted the irony in the plaintiffs' having been given "standing to assert associational rights while lacking standing to

---

197. Spaulding v. Univ. of Wash., 740 F.2d 686 (9th Cir. 1984) (citing Ruffin v. County of L.A., 607 F.2d 1276, 1281 (9th Cir. 1979) ("The County's past employment practices as to its deputy-sheriffs, however ill-conceived, did not serve as a foundation for this suit brought under Title VII and the Equal Pay Act.")).

198. Am. Fed'n of State, County and Mun. Employees v. County of Nassau, 664 F. Supp. 64 (E.D.N.Y. 1987).

199. *Id.* at 66-67.

200. *Id.* at 66.

201. *Id.* (citing Stewart v. Hannon, 675 F.2d 846, 849-50 (7th Cir. 1982)).

202. *Id.*; *see also* Patee v. Pac. Nw. Bell Tel. Co., 803 F.2d 476, 478 (9th Cir. 1986) ("Male workers cannot assert the right of their female co-workers to be free from discrimination based on their sex."); Spaulding v. Univ. of Wash., 740 F.2d 686, 709 (9th Cir. 1984) ("[A] male faculty member cannot bootstrap job grievance[s] into [a] Title VII claim, even where female faculty members have [a] cognizable claim.").

203. *Am. Fed'n of State, County and Mun. Employees*, 664 F. Supp. at 66-67.

204. *Id.* at 67.

assert pecuniary rights."[205] The court explained that:

> As a matter of public policy, it is perhaps strange that a plaintiff may come to federal court with a complaint that he is losing associational benefits which are hard to quantify, while he is barred from complaining of a loss of easily quantifiable dollars. Title VII, however, focuses on whether the plaintiff suffers discrimination because of who he is. Thus, the plaintiffs in Stewart and Waters, who had standing, were denied the benefits of associating with members of minority groups because those plaintiffs were white. Goldberg and Jordan, in contrast, do not contend that they are underpaid because they are men. To the contrary, they allege that they are men who are being mistreated because they are being treated like women. As such, they have not stated a claim under Title VII. Should this be bad public policy, the remedy is with Congress. In accordance with the reasoning in *Patee*, the court dismisses the [T]itle VII claims of Goldberg and Jordan.[206]

It is thus clear that while a split existed among courts as to how to frame, conceptualize, and adjudicate cases like *Ricci*, *Ricci* never acknowledged these cases or any jurisdictional or other obstacle before it found that all of plaintiffs had been the victims of presumptively unlawful disparate treatment. The notion that the city's alleged intent to discriminate based on race would "transfer" to each plaintiff regardless of his race was simply accepted as the case's premise.

It will be interesting to see what the ramifications of this wrinkle of the holding in *Ricci* will be, both in terms of how it may be used as precedent, and whether this potential use was ever intended by the Court. One potentially unintended ramification of the decision in *Ricci* would manifest itself if members of classes not suffering discrimination in a workplace could demonstrate that, for example, where a certain number of people needed to be let go or demoted, and even a single individual was informally discussed in terms of his or her protected class status ("Sheila's on maternity leave and expecting to come back from leave into her same job" or "If we demote Bob along with the others, we won't have any African American managers,") and subsequently spared.

Under *Ricci*, a Caucasian person who was let go along with many others and whose race was not a factor in the decision at all could potentially show so much as protected class consciousness or awareness in

---

205. Am. Fed'n of State, County and Mun. Employees v. County of Nassau, 664 F. Supp. 64 , 67 (E.D.N.Y. 1987).

206. *Id.*

a decision, and, resultantly, establish Title VII liability. This could severely undermine or actually thwart Title VII's plain language, legislative intent, and established jurisprudence. Relatively few decisions surrounding layoffs, reductions in force, etcetera are made with absolutely no consciousness as to protected class status. The potential for any such considerations to be construed by a court as "race (or some other protected class) conscious" or "race or protected class cognizant," and thus, illicit, should be viewed as dangerous. This possible ramification of the decision in *Ricci* should certainly raise some concern, or at least some further discussion.

VI. CONCLUSION

With the holding and language in the *Ricci* case, the U.S. Supreme Court looks to have formally endorsed what might come to be called a "transferred intent" theory of proceeding under Title VII, whereby a plaintiff need not show that her race motivated the act or decision at issue—or that it was even contemplated by the decision makers. It also looks to have resolved a split among courts that spans decades and numerous factual iterations, but boils down to the question of Title VII's intended reach and potentially unintended consequences.

On one hand, as the Court has observed before, the language of Title VII "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment,'"[207] thus rendering its remedial goals broad-based. On the other hand, however, the statute's plain language dictates that to run afoul of Title VII's mandates, a defendant must "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race*. . . ."[208]

Whereas the Supreme Court looks to have resolved a split as to the reach of Title VII that has spanned both time and geography, it is fascinating that it looks to have done so implicitly and almost inadvertently. The sudden injection of the principle of transferred intent into Title VII jurisprudence needs to be recognized, contemplated, and weighed, as do its consequences, as the law in this area moves forward.

207. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (citing L.A. Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

208. 42 U.S.C. § 2000e-2(a)(1) (2006) (emphasis added).

***